IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

C.R. NO. 79 Of 2001.

Date of decision : 11.6.2007.

Ram Sarup and Others. ……. Petitioners.

Vs.

Shiva Devi and Another. ……. Respondents.

Coram
The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting?.No.

For the petitioners: Mr. H.K. Bardwaj, Advocate.

For the respondents: Mr. Ajay Kumar, Advocate.

Surinder Singh, J (oral):

The present revision petition has been filed by the plaintiffs, feeling aggrieved by and dissatisfied with the order dated 23.1.2001, passed by Sub Judge (II), Una, on an application under Order 23 Rule 1 of the Code of Civil Procedure, moved in Civil Suit No.29 of 1996, whereby, the said application was dismissed.

In brief, the facts are that the plaintiffs, the petitioners herein, had filed a suit for permanent injunction restraining the defendants from causing any interference in any manner or to take forcible possession of the land comprised in khewat khatauni No.934 min/ 1270 min, Khasra No.2527min, measuring 6 kanal, situated in village Polian Beet, Tehsil and District Una, HP, as recorded in the jamabandi for the years 1987-88. The defendants (respondents herein) have denied the ownership and possession of the plaintiffs over the suit land. According to them, it is owned and possessed by the State of Himachal Pradesh. The issues were also framed on 22.11.1996 by the trial court and the matter was at the stage of recording the

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Whether reporters of local Papers may be allowed to see the judgment? Yes.

statements of the plaintiffs' witnesses. An application under Order 23 Rule 1 of the Code of Civil Procedure was moved on 10.5.1999 by the plaintiffs for the withdrawal of the suit with permission to file afresh on the same cause of action. The reason for moving the said application was indicated in para-3, which is as under:-

> **"3. That after search of revenue record it has come to light that certain mutation out of suit land has been sanctioned in favour of different persons. The same has not been referred to in the plaint. There is thus formal technical defect in the frame of the suit, which goes to the root of the case and because of which the suit might fail. It is proper in then interest of justice that the plaintiff be allowed to withdraw the suit with permission to file afresh on the same cause of action."**

In reply, the defendants denied the aforesaid para and according to them, if need be the necessary party can be arrayed by moving an application under Order 1 Rule 10 of the Code of Civil Procedure. There is no formal and technical defect in the plaint, as alleged. The mutations have no relevancy in the matter. It is alleged that no stay was granted to the plaintiffs under Order 39 Rules 1 and 2 of the Code of Civil Procedure, their appeal was dismissed by the District Judge. The permission to withdraw the suit with liberty to file afresh on the same cause of action would result in harassing the defendants time and again.

After hearing the parties and upon going through the record, the trial court dismissed the application on the ground that the plaintiffs did not specifically plead the formal technical defect in the suit. The contention of the plaintiffs regarding attestation of mutation in the name of different persons who could not be referred in the plaint is not a formal defect, however, on these facts the parties could be added by way of amendment. Since the application did not disclose any formal defect for the withdrawal of the suit with permission to file afresh on the same cause of action,

therefore, the application was held to be devoid of any merit by the trial court. The said order has been assailed in this petition on the ground that the defect in Civil Suit No.29/1996 is formal one, which was alleged to be a ground for withdrawing the suit. Since there were allottees of the land in the said Khasra number and in case the permission is granted, they can only be brought on record by filing a fresh suit. Thus prayed for the acceptance of the revision petition.

I have heard the learned counsel for the parties and have examined the record.

Legally, a party, which has initiated the proceeding, is entitled to withdraw the same at any stage, it likes, unless it is precluded by law from doing so. In other words, right to withdrawal of a suit without any liberty for institution of the fresh suit is an unfettered right of the plaintiff unless a vested right has already accrued to the other party in the suit. On principle, an application by a plaintiff under sub-rule (3) of Order 23 cannot be treated on par with an application by him to exercise the absolute liberty given to him under sub-rule (1), it is actually a prayer for a concession from the Court after satisfying the Court regarding the existence of circumstances justifying the grant of such a concession. In such a situation, the relief under Order 23 Rule 1 can be granted only when the defect pointed out is a formal one and not substantial one. The object of Order 23 Rule 1 is not to allow a plaintiff with an opportunity of commencing the trial afresh after he has failed to conduct the suit, with due care and diligence. **[Please see (2003) 2 Shim. LC 24 HP]**

Formal defect means a defect of form, which is prescribed by rules of procedure, but a defect which goes to the root of the plaintiff's claim is not a formal defect. Thus, the "formal defect" need

not necessarily be in the pleadings. Therefore, the rule requires that the court must be satisfied that the suit must fail by reason of some formal defect and the application of the plaintiff has to specify the formal defect(s) in the suit, which are likely to lead to dismissal of suit.

In the instant case, according to the plaintiff, certain mutations qua the suit land were sanctioned, in favour of different persons, which could not be referred to in the plaint. Precisely, the non-joinder of parties can be remedied by the addition of the necessary parties. **[Please see AIR 1977 HP 91 (92), 1996 AIHC 4653 (4654), AIR 1956 Bom. 632 (633)].** Whereas the details of the mutations can also be included in the plaint by seeking amendment as per procedure contained in Order 6 Rule 17 C.P.C.

Therefore, in these circumstances the plaintiff failed to pin point a formal defect, which could fail the suit to give him liberty to file the suit afresh on the same cause of action. In my considered opinion, I do not find it a case where any material prejudice has been caused to the plaintiffs by declining the relief prayed for. The impugned order is upheld. Therefore, the petition deserves to be dismissed and is accordingly dismissed. However, the plaintiffs are at liberty to move an application for seeking the requisite amendment under Order 6 Rule 17 C.P.C. read with Order 1 Rule 10 of the Code of Civil Procedure, on **4.8.2007** before the trial court, on which date the parties shall put in their presence. If the application aforesaid is moved, the trial court shall give reasonable time to file the reply by the defendants and shall decide the matter expeditiously, keeping in view the age of pendency of the suit.

Record of the trial court be returned forthwith. The matter stands disposed of.

June 11, 2007.
(Pds)

(Surinder Singh)
Judge.